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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. CR 07-00745-01 JF
	)	
Plaintiff,	)	<b>SUPPLEMENTAL</b>
	)	<b>SENTENCING MEMORANDUM</b>
vs.	)	
	)	
JOSE TORRES-CALDERON,	)	Date : 07-17-08
	)	Time : 9:00 a.m.
Defendant.	)	Judge : Hon. Jeremy Fogel
_____	)	

**Introduction**

Jose Torres-Calderon entered a plea of guilty to a single count information filed on November 27, 2007 alleging a violation of 8 U.S.C. §1326 – Illegal Re-Entry Following Deportation. Mr. Torres-Calderon pled open and not pursuant to any plea agreement on April 16, 2008.

The Government contends that the defendant's offense level should be increased pursuant to USSG §2L1.2(b)(1)(A)(i) which provides for a 16 level increase where a defendant has sustained a felony "drug trafficking" conviction for which a sentence in excess of 13 months was imposed or USSG §2L1.2(b)(1)(B) which provides for an 8 level increase where a defendant has sustained a conviction for an "aggravated felony." This position is based on a California Health and Safety Code §11352 conviction suffered by the defendant in 1992.

1 The defense submits that Government has not met its burden to establish that the alleged  
 2 subject conviction is either a “drug trafficking offense” or an “aggravated felony” and further,  
 3 assuming this burden has been met, the principle’s enunciated in *Apprendi v. New Jersey*, 530  
 4 U.S. 466 (2000) prohibit the Court from imposing the subject enhancements.

5 The defense also submits that Criminal History Category VI over represents his criminal  
 6 history and that Criminal History Category IV best represents his criminal history.

7 Finally the defense believes that departures are warranted based primarily on “sentencing  
 8 disparity.”

#### 9 **Base Offense Level Calculation:**

##### 10 **Specific Offense Characteristic**

11 The application of USSG §2L1.2(b)(1)(A)(i) and (B) for the subject drug conviction is  
 12 inappropriate for three reasons: First, in determining whether a prior conviction should be  
 13 considered an “aggravated felony” or “drug trafficking” offense for federal sentencing purposes  
 14 the analytical model constructed by the Supreme Court in *Taylor v. United States*, 495 U.S. 575  
 15 (1990) should be employed. Under this approach the court may not look to the underlying facts  
 16 of the prior offense. The court may only look to the fact of conviction and the statutory definition  
 17 of the prior offense. [*United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9<sup>th</sup> Cir.2004).] As  
 18 the Government recognizes, Ninth Circuit cases applying *Taylor’s* categorical analysis have  
 19 concluded that California Health and Safety Code § 11352 does not constitute either a “drug  
 20 trafficking” offense or “aggravated felony.” [See Gov’t Sentence Memo, p.3:18-20; *United*  
 21 *States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9<sup>th</sup> Cir. 2001) and *United States v. Navidad-*  
 22 *Marcos*, 367 F.3d 903, 908 (9<sup>th</sup> Cir.2004).]

23 For this reason the Government seeks to establish that the subject conviction constitutes a  
 24 qualified “drug trafficking” offense by employing the “modified categorical approach” endorsed  
 25 in *Taylor v. United States*, 495 U.S. 575 (1990) Under the modified categorical approach a court  
 26 may examine “documentation or judicially noticeable facts that clearly establish that the  
 27 conviction is a predicate conviction for enhancement purposes.” [*United States v. Corona-*  
 28

1 *Sanchez*, 291 F.3d 1201, 1203 (9<sup>th</sup> Cir.2002).] The purpose of employing the modified  
 2 categorical approach is to determine if the record “unequivocally” establishes that the defendant  
 3 was convicted of a qualified predicate offense even if the penal statute in question is over  
 4 inclusive. [*United States v. Velasco-Medina*, 305 F.3d 839, 851(9<sup>th</sup> Cir.2002); *United States v.*  
 5 *Corona-Sanchez*, 291 F.3d 1201, 1211 (9<sup>th</sup> Cir.2002).] It is the Government’s burden to clearly  
 6 and unequivocally establish that the conviction is a qualified predicate offense. Further the  
 7 documents used to satisfy a modified categorical analysis must meet a “rigorous standard.  
 8 [*United States v. Sandoval-Venegas*, 292 F.3d 1101, 1106 (9<sup>th</sup> Cir. 2002).] (1990) Accordingly,  
 9 absent evidence that permits a determination that the subject conviction constitutes a “drug  
 10 trafficking” offense or “aggravated felony” these characterizations of the alleged subject offense  
 11 should be rejected.

12 Attached to the Government’s Sentencing Memorandum is an abstract of judgment and a  
 13 minute order to establish that Mr. Torres-Calderon was convicted of a predicate offense. [See  
 14 Gov’t Exhibits B and C.] Neither document is sufficient to establish this claim. An abstract of  
 15 judgment is not sufficient to establish “unequivocally” that Mr. Torres-Calderon was convicted  
 16 of a “drug trafficking offense.” [*United States v. Navidad-Marcos*, 367 F.3d 903, 909 (9<sup>th</sup>  
 17 Cir.2004), where the trial court relied solely on an abstract of judgment.] As was stated in *United*  
 18 *States v. Navidad-Marcos*:

19 Under California law, as the Supreme Court of California has recently reminded  
 20 us: “An abstract of judgment is not the judgment of conviction; it does not control  
 21 if different from the trial court's oral judgment and may not add to or modify the  
 22 judgment it purports to digest or summarize.” [Citations Omitted] Preparation of  
 23 the abstract of criminal judgment in California is a clerical, not a judicial  
 24 function.[Citations Omitted] Indeed, in California, “appellate courts routinely  
 25 grant requests on appeal of the Attorney General to correct errors in the abstract of  
 26 judgment.” [Citations Omitted] Under California law, the form of the abstract of  
 27 judgment is promulgated by the Judicial Council of California. [Citations  
 28 Omitted] The form simply calls for the identification of the statute of conviction  
 and the crime, and provides a very small space in which to type the description. It  
 does not contain information as to the criminal acts to which the defendant  
 unequivocally admitted in a plea colloquy before the court. [*United States v.*  
*Navidad-Marcos*, 367 F.3d 903, 908 (9<sup>th</sup> Cir.2004).]

The Government has also attached a minute order to support the claim that the subject conviction  
 constitutes a “drug trafficking offense.” The minute order is also insufficient in that, like the

1 abstract of judgment it's preparation is a clerical function, not a judicial function.

2 The Ninth Circuit has identified several kinds of documents and judicially noticeable  
3 facts that courts may consider under the modified categorical approach to determine whether a  
4 conviction is a predicate conviction for enhancement purposes, to wit: the indictment, the  
5 judgment of conviction, jury instructions, a signed guilty plea, and the transcript of the plea  
6 proceedings. [*United States v. Contreras-Salas*, 387 F.3d 1095, 1097-1098 (9<sup>th</sup> Cir. 2004).] The  
7 Government also attached copies of the charging documents to its Sentencing Memorandum [See  
8 Gov't Exhibit A.]; however, these document merely tell us what charges were filed. It does not  
9 establish any charges of which the defendant was convicted.

10 By reason of the foregoing, the defense contends that the Government has not met its  
11 burden of to clearly and unequivocally establishing that the conviction is a qualified predicate  
12 offense.

13 Second, the subject conviction cannot be used to support the USSG §2L1.2(b)(1)(A)(i)  
14 and (B) enhancements if the fact of the conviction is not admitted or proven to a jury beyond a  
15 reasonable doubt. [See *Shepard v. United States*, 544 U.S. 13 (2005); *Apprendi v. New Jersey*,  
16 530 U.S. 466 (2000).] Counsel is aware of *Almendarez-Torrez v. United States*, 523 U.S. 224  
17 (1998) as it pertains to the issue of the use of prior convictions, but contends that *Shepard* and  
18 *Apprendi* effectively overrule *Almendarez-Torres* or at least create constitutional doubt as to its  
19 continuing validity. [“*Almendarez-Torres*, ... , has been eroded by this Court's subsequent *Sixth*  
20 *Amendment* jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres*  
21 was wrongly decided.” *Shepard v. United States*, 544 U.S. 13, 27 (2005) (conc.opn. of Thomas,  
22 J.)]

23 Third, based on an *Apprendi* he Ninth Circuit recently concluded that the dates of a  
24 previous felony conviction and of a previous removal from the United States, subsequent to that  
25 conviction, must be alleged in the indictment and proved to a jury for the defendant to be subject  
26 to an increased sentence under 8 U.S.C. § 1326(b). [*United States v. Salazar-Lopez*, 506 F.3d  
27 748, 749-750 (9<sup>th</sup> Cir.2007).] In so holding, the Court reasoned that the fact that triggered the  
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1 statutory maximum of §1326(b) was the sequence of prior conviction and the defendant's two  
 2 removals, not the mere fact of the prior conviction: "As such, the date of the removal, or at least  
 3 the fact that Salazar-Lopez had been removed after his conviction, should have been alleged in  
 4 the indictment and proved to the jury. The failure to do so was an *Apprendi* error." [*Id.* at 752 .]  
 5 The information in the instant case alleges three different dates of removal but does not allege the  
 6 temporal relationship between any of the three removals and the subject alleged predicate  
 7 conviction, and therefore implicates the *Apprendi* error recognized in *Salazar-Lopez*.

8 Accordingly, absent "unequivocal" proof of a predicate conviction for any enhancement  
 9 under the guidelines and in view of the *Apprendi* errors discussed herein, the correct Total  
 10 Offense Level is 6 (Base Offense Level of 8 minus 2 for Acceptance of Responsibility).

### 11 **Criminal History Calculation**

#### 12 **A Departure is Warranted Under USSG §4A1.3**

13 The defense submits that the Criminal History Category VI over represents the  
 14 seriousness of the defendant's criminal history. Defendant's most serious conviction took place  
 15 fifteen years ago, in 1992. Five misdemeanor convictions stem from the fact that he was driving  
 16 with a suspended license and little else. In regards to the suspended license charges it should be  
 17 noted that Mr. Torres-Calderon can not get a valid California license due to his immigration  
 18 status and so cannot remedy his license status. One could reply that he simply should avoid  
 19 driving, but this is not a realistic resolution given the transit system in the Bay Area. Two of the  
 20 five suspended license charges per the PSR calculations resulted in six criminal history points.  
 21 [See PSR, *Paragraphs 31, 34 and 40.*] Further, the only other drug related conviction is based  
 22 on possession and under the influence conduct which is far less serious than the drug offense  
 23 which resulted in a prison sentence.

24 Given the totality of the circumstances, the defense contends that Criminal History  
 25 Category IV best represents the seriousness of this defendant's criminal history. [§4A1.3(b)(1)]

#### 26 **Discussion of 18 U.S.C. §3553(a) Factors**

27 Under *United States v. Booker*, 543 U.S. 220 (2005), it is clear that the courts may no  
 28

1 longer uncritically apply the guidelines. In every case, a sentencing court must now consider all  
2 of the 18 U.S.C. §3553(a) factors, not just the guidelines, in determining a sentence that is  
3 sufficient but not greater than necessary to meet the goals of sentencing. And where the  
4 guidelines conflict with other sentencing factors set forth in 3553(a), these statutory sentencing  
5 factors should generally trump the guidelines. See *United States v. Denardi*, 892 F.2d 269, 276-  
6 77 (3d Cir. 1989)

7           Of the several 3553(a) factors that the Court must consider, several merit discussion here.  
8  
9 As regards the nature and circumstances of the offense [3553(a)(1)] the defense points out that  
10 the crime of unlawful reentry in and of itself does not cause harm to person or property. It is  
11 designed to protect our borders from people who are deemed undesirable, but who nevertheless  
12 return primarily due to the economic conditions they find in their own country. The history and  
13 characteristics of Mr. Torres-Calderon probably does not create a lot of sympathy considering his  
14 criminal history, however, he like others found himself in a position where he felt he had no  
15 other realistic choice. It was either stay in Mexico and starve, or take the risks of criminal  
16 prosecution and have a better chance of surviving in the United States.

18           Regarding the need for the sentence imposed to reflect the seriousness of the offense, to  
19 promote respect for the law, to provide just punishment for the offense, to afford adequate  
20 deterrence to criminal conduct and to protect the public from further crimes of the defendant.  
21 [3553(a)(2)(A), (B) and (C)], it comes down to how much incarceration will accomplish these  
22 goals. The defense concedes that a minimal to moderate period of incarceration will satisfy these  
23 specific goals, however a lengthy period of incarceration simply does not appear to appropriate  
24 for this type of crime. As regards providing the defendant with needed educational or vocational  
25 training, medical care, or other correctional treatment in the most effective manner  
26  
27  
28

1 [3553(a)(2)(D)] it appears that he may not qualify for the type of programs that will assist him,  
2 such as a drug program that will assist him with his admitted addiction.

3 Counsel also contends that in this case the issue of “*sentence disparity*” [3553(a)(6)]  
4 should be carefully considered in determining a sentence that is sufficient, but not greater than  
5 necessary to comply with the statutory directions set forth in 18 U.S.C. §3553(a).  
6

7 **A Variance is Warranted to Avoid Sentencing Disparities**

8 The Government argues that the appropriate guideline range for imprisonment is 77 to 96  
9 months, based on a total offense level of 21 and Criminal History Category of VI. The Fast Track  
10 offer in this case was 37 months. The low end of the guideline calculation as argued by the  
11 Government is more than double the Fast Track offer. It seems apparent that most defendants in  
12 the position of Mr. Torres-Calderon would receive a lesser sentence because of a Fast-Track  
13 agreement. Thus the a sentence of 77 months does not reflect the sentences of defendants who  
14 committed similar crimes and have similar records to Mr. Torres-Calderon. Under these  
15 circumstances the need to avoid unwarranted sentence disparities among defendants with similar  
16 records should be considered. [18 U.S.C. §3553(a)(6)]  
17

18 It is correct that Mr. Torres-Calderon chose not to accept the Fast-Track offer and instead  
19 chose to plead open and keep his right to argue for a lesser sentence and to appeal. The factors  
20 that influenced his decision are well known to all defense attorneys. Ignorance and distrust play a  
21 huge role. This is particularly true among defendants who are Mexican nationals facing 1326  
22 prosecutions who have never been prosecuted federally do not understand and cannot accept that  
23 the federal system of prosecution is different from the state system and in many respects harsher.  
24 This lack of understanding contributes to the distrust of defense counsel, particularly when  
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26  
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1 defense counsel is court appointed. In the case of 1326 prosecutions ignorance and distrust is  
2 further fueled by the frustration felt by defendants who have just completed a state court sentence  
3 and cannot understand why their “mere presence” in this country constitutes a crime when from  
4 their perspective they have harmed no one. The Sentencing Guidelines are also huge barriers to  
5 the resolution of these cases because defendants find it unbelievable that they are being punished  
6 again for past crimes which in their view have already been paid for with incarceration. The  
7 common refrain by Mexican nationals is “*Ya pague por ese caso*,” meaning “I already paid for  
8 that crime.” So it is the case that defendants, particularly in 1326 cases, cannot accept the logic  
9 of accepting a Fast-Track offer even when confronted with the guideline exposure of an open  
10 plea or after trial. If this were not enough to impede resolutions of 1326 cases, there is also the  
11 fact that there are many “jail house attorneys” inside the main jail who do not hesitate to counsel  
12 their cell mates with tales based on their own sense of fairness, cases they only heard about and  
13 on an incomplete understanding of the facts and applicable law.

14  
15  
16  
17 Setting aside the prudence of his decision, one must also consider the “benefits” that Mr.  
18 Torres-Calderon received by way of his open plea. One benefit is that he could argue for a lesser  
19 sentence. Another benefit is that he can appeal. In most cases, as here, these two benefits are  
20 illusory. The reality is that the only one who really benefitted was the system. Both the  
21 government and court obtained a plea without the burden of a trial.

22  
23 Except for retaining the right to appeal, there is little difference between what burden is  
24 placed on the judicial system by acceptance of a Fast-Track offer and an open plea. In both  
25 situations the end result is that there is an early resolution that avoids the expense of a trial.  
26 Certainly the fact that Mr. Torres-Calderon retained the right to argue for a lesser sentence  
27  
28



1 created only a minimal extra burden on the government and court. No doubt the early plea here  
 2 substantially satisfied whatever policies support the Fast-Track system. If Mr. Torres-Calderon  
 3 were to waive his right to appeal, then the differences between accepting the Fast Track offer and  
 4 an open plea are virtually non-existent.  
 5

6 Defense counsel is advised that Mr. Torres-Calderon is prepared to waive his right to  
 7 appeal. Given the foregoing discussion and in particular the disparities between the Fast-Track  
 8 offer and the Guideline range as argued by the Government it is submitted that a variance is  
 9 justified here and that a sentence in line with the Fast-Track offer of 37 months would be  
 10 appropriate and sufficient under the facts of this case.  
 11

### 12 **Two Other Grounds Warranting a Variance**

13 In addition to “sentencing disparity” the Court should also consider two other factors: (1)  
 14 A deportable alien is subjected to harsher confinement as he is ineligible for access to the BOP’s  
 15 drug treatment, early release and community confinement programs that are otherwise available  
 16 to the general population; and (2) this defendant will no doubt be deported after completing his  
 17 sentence.  
 18

### 19 **Conclusion**

20 The defense requests that the Court find that the Government has not established that the  
 21 alleged drug conviction does not constitute either a “drug trafficking” offense or “aggravated  
 22 felony” within the meaning of USSG §2L1.2(b)(1)(A)(i) and (B). Assuming the Government did  
 23 meet its burden then the Court should hold that application of the enhancements would violate  
 24 the defendant’s Sixth Amendment rights under *Apprendi*.  
 25

26 The defense also requests that the Court conclude that Criminal History Category VI over  
 27  
 28

1 represents the defendant's criminal history and that Criminal History Category IV best represents  
2 the defendant's criminal history.

3 Finally, the defense requests that the Court depart from the Guideline calculations  
4 proposed by the Government on the basis of : sentencing disparity; harsher treatment received by  
5 alien prisoners; and the fact that the defendant will be deported.  
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7  
8 Respectfully submitted,

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10  
11 Dated: July 15, 2008  
12 \_\_\_\_\_

\_\_\_\_\_/s/  
Alfredo M. Morales, Esq.  
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Jose Torres-Calderon